No. 92-1450

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL,
Petitioners,
v.
CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL ASSOCIATION OF COUNTIES, AND U.S. CONFERENCE OF MAYORS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a public employer whose termination decision was motivated solely by substantiated reports of unprotected, insubordinate speech can nevertheless be held liable under the First Amendment, without any judicial consideration of the public employer's legitimate need to maintain harmony in the workplace.

2. Whether, in January 1987, it was clearly established that public officials could be held liable under the First Amendment for discharging an employee based on substantiated reports of unprotected, insubordinate speech, without any judicial consideration of the public employer's legitimate interest in maintaining harmony in the workplace.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling in-

terest in legal issues that affect state and local governments. Because every state or local government is an employer, constitutional issues affecting their ability to function in that capacity are of manifest importance to *amici*.

Contrary to this Court's teachings, the decision of the court below totally ignores " 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). Unless reversed, the decision below will be extremely deleterious to the functioning of States and local governments by greatly impairing their ability to provide high quality, cost-effective services to their citizens. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT OF THE CASE

Petitioner McDonough District Hospital hired respondent Cheryl Churchill as a nurse in its obstetrics ("OB") department in October 1982. Pet. App. 2. Churchill received favorable performance evaluations through December 1985. *Id.*

In early 1986, petitioner Kathleen Davis, the Hospital's new vice-president of nursing, implemented a "cross-training" policy—a policy of training full-time nurses from general medical areas of the hospital in more specialized nursing disciplines to permit flexible staffing. Pet. App. 32. In August 1986, Churchill's immediate supervisor, petitioner Cynthia Waters, issued a written warning to Churchill for "[i]nsubordination . . . [and for her] [g]eneral negative attitude and lack of support toward nursing administration in the OB Department." Pet. App. 33. In December 1986, Waters further stated in Churchill's annual evaluation that she "exhibits negative behavior towards me and my leadership" and "promotes an unpleasant atmosphere and hinders constructive communication and cooperation." Pet. App. 2, 6.

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

On January 16, 1987, Churchill engaged a cross-trainee, Melanie Perkins-Graham, in conversation about the OB department and its practices. Pet. App. 6-7. According to Churchill, the conversation included complaints about the cross-training policy and its perceived effects on patient care. Pet. App. 6. During the same conversation, Churchill reportedly complained about Davis and Waters and about "how bad things are in OB in general." *Id.* Another nurse, Mary Lou Ballew, overheard part of the conversation and, because she believed it to be harmful to Perkins-Graham's morale, reported the conversation to Waters. *Id.* at 35. Waters, in turn, reported the incident to Davis, who met with Perkins-Graham and confirmed that Perkins-Graham had indeed understood Churchill to have made negative statements about Waters and the department. *Id.* at 6-7. Waters and Davis then met with petitioner Stephen Hopper, the President of the Hospital, and Bernice Magin, the hospital's personnel director; at this meeting it was agreed that Churchill would be terminated. Pet. App. 7.

As a consequence, on January 27, 1987, Waters and Davis met with Churchill and advised her that, because she had continued to undermine the department and the hospital administration, she was being

fired. Pet. App. 36. Churchill appealed the decision to Hopper. *Id.* Hopper sustained the discharge on the ground that Churchill's statements were insubordinate, made in an inappropriate forum, and interfered with the department's operations. *Id.*

2. Churchill brought suit alleging, *inter alia*, that she had been terminated by petitioners in retaliation for exercising her First Amendment rights—specifically, for the comments that she had made about the hospital staff and its cross-training policies. Pet. App. 37. The district court granted summary judgment to petitioners, reasoning that "[a]ll of the versions of Churchill's statements have a common denominator—all are indicative of an attempt to simply air personal grievances rather than to speak out on an issue of public concern," and that, "[a]s such, Churchill's statements are not entitled to First Amendment protection." *Id.* at 45. The court further held that, even if the speech related to an issue of public concern, "the type of criticism which Churchill voiced . . . about her superiors was inherently disruptive" of the Hospital's "need to foster healthy working relationships between an employee and her supervisors and co-workers." *Id.* at 49.

3. The court of appeals reversed because, "according to Churchill's version of her statements, she was speaking out on improper nurse staffing policies at McDonough District Hospital that endangered the quality of patient care, an issue that is most certainly a matter of public concern." *Id.* at 11. The court further held that "Churchill's interest in fulfilling her duties and obligations as an ethical, responsible professional . . . clearly outweighs the hospital's interests in interfering and ultimately

preventing her from speaking out on important matters of public concern." *Id.* at 20.

The court of appeals next rejected petitioners' argument that "they have a complete defense to Churchill's claims because, as Churchill alleges, they were unaware of the actual content of her January 16, 1987 conversation." Pet. App. 22. The court held that "the employer is liable for violating the employee's free speech rights regardless of what the employer *knew* at the time of termination." *Id.* at 25 (emphasis in original). The court also rejected the individual petitioners' claims of qualified immunity. Pet. App. 24-27.

SUMMARY OF ARGUMENT

Ignoring this Court's long line of precedents which make the legitimate needs of public employers in running a workplace central to First Amendment analysis, the court of appeals created revolutionary standards for First Amendment liability which seriously threaten the ability of public employers to function as employers. In so doing, the court below made three fundamental errors of law, each of which provides grounds for reversal.

1. First, the court of appeals erred in holding that protected speech of which an employer is entirely unaware can nevertheless form the basis for First Amendment liability. Under the court of appeals' novel approach, an employer whose termination decision is motivated solely by believable, substantiated reports of unprotected, insubordinate speech can be found liable to the terminated employee. This rule flouts this Court's decision in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977),

which makes the motivation of the public employer in taking the termination action the key to its liability. The court of appeals' rule also defies common sense, as it would prevent public employers from making necessary personnel decisions for lawful reasons, for fear that they might have overlooked some form of protected expression later found to be intermingled with the incident prompting the adverse action.

2. Even if the protected portion of Churchill's speech could form a basis for petitioners' liability, the court of appeals clearly erred by wholly neglecting to "arrive at a balance between the interests" of the employee in speaking on matters of public concern and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). While the court of appeals criticized the manner in which the trial court struck the *Pickering* balance, Pet. App. 17-20, it made no effort to strike its own. Instead, it substituted one-sided observations about the workplace conflict in this case for the "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public" which this Court's precedents require. *Connick v. Myers*, 461 U.S. 138, 150 (1983) (describing *Pickering*'s balancing requirement).

The court of appeals thus failed to recognize that, even where a public employee's speech touches upon a matter of public concern, a public employer may nevertheless be entitled to take an adverse employment action if, as here, the employer "reasonably believe[s] [that the speech will] disrupt the office, undermine [the employer's] authority, and destroy

close working relationships." *Connick*, 461 U.S. at 154.

3. Finally, the court of appeals erred again by holding that the qualified immunity doctrine does not protect the individual petitioners from the operation of that court's novel legal standards. This Court has repeatedly held that government officials must be shielded from liability for civil damages unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The court of appeals' refusal to extend qualified immunity to the individual petitioners cannot be squared with that standard, given the state of the law at the time of petitioners' actions.

ARGUMENT

I. THE COURT OF APPEALS' FIRST AMENDMENT ANALYSIS IGNORES THIS COURT'S PRECEDENTS, WHICH RECOGNIZE THE NEED OF PUBLIC EMPLOYERS TO TAKE DECISIVE PERSONNEL ACTION WHEN NECESSARY TO CARRY OUT THEIR PUBLIC MISSIONS

Central to this Court's constitutional jurisprudence in the public employment realm is its recognition of "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983). The court of appeals' imposition of liability without the requisite causation, as well as its failure to accord proper deference to the employer's interest under the *Pickering* balancing analysis, squarely conflict with this Court's precedents. These emphasize the need of "the State, as an employer" to "promot[e] the effi-

ciency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

The court of appeals' decision dramatically erodes public employers' ability to make use of a management tool critical to the effective operation of any organization, whether public or private—"the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring), *quoted in Connick*, 461 U.S. at 151. "Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." *Id.*

Because the court of appeals' framework introduces the need to investigate surrounding circumstances and heightens the concern over litigation by establishing a standard which ignores the employer's legitimate interests, it will result in overly cautious and slow decisionmaking. This Court has already refused to require delay in personnel decisions where it would interfere with the employer's ability to run its workplace. *Connick*, 461 U.S. at 152 ("we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action") (footnote omitted).

Hence, the decision below would impose great costs on public employers—and, by extension, on the citizens whom they serve. Capital and human resources that would be better spent in efficiently delivering government services would instead be diverted into

investigation into matters irrelevant to the employer's personnel decision, as well as litigation over both the discharge and the investigation itself. Because the practical consequences of the decision below would undermine public employers' ability to provide high quality, cost-effective services to the public, it is essential that the serious legal errors of the court of appeals be corrected.

A. A Public Employer Does Not Violate the First Amendment When It Terminates An Employee for Reasons Unrelated to Speech About Matters of Public Concern

This Court has repeatedly emphasized that judicial superintendence of public employers' personnel decisions has specific and defined limits. Ordinary dismissals from government service are not subject to judicial review merely because the employer's reasons "may not be fair" or because they "are alleged to be mistaken or unreasonable." *Connick*, 461 U.S. at 146-47 (citations omitted).

This reflects a recognition that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies[,]" despite "the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs." *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). Only where an unconstitutional motive is alleged is it proper for a federal court to step in and review the personnel action on constitutional grounds: "In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erro-

neous, can best be corrected in other ways." *Id.* at 350.

For these reasons, in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the Court held that, as a threshold matter, a public employee alleging a First Amendment violation must demonstrate that protected expression was a "substantial" or "motivating" factor in the employer's employment decision. *Id.* at 287.[2] In establishing its causation rule, which shields public employers from First Amendment liability for personnel decisions that they would have reached "even in the absence of the protected conduct," *id.*, the *Mt. Healthy* Court reaffirmed the public employer's interest in running its workplace. An employee cannot block legitimate personnel actions simply by engaging in protected conduct, the Court clarified, reasoning that protected expression should not "place an employee in a better position . . . than he would have occupied had he done nothing." *Id.* at 285. Instead, the Court held, it is enough that "an employee is placed in no worse

[2] *Accord NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) (First Amendment violation may be found only where the employer is "motivated by a desire to punish plaintiff for exercising his First Amendment rights"); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (noting that employee must "show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech"). *See* Laurence H. Tribe, *American Constitutional Law* 815 (2d ed. 1988) (discussing need for "judicial scrutiny to detect illicit purposes" in the public employment setting and noting that "the *Pickering* rule would be empty if courts did not seek to determine whether an illicit motive had entered into a decision"). *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (motivation central to liability for gender discrimination).

position than if he had not engaged in the conduct." *Id.* at 285-86.

Despite this controlling precedent, the court of appeals' First Amendment analysis ignored motivation. Its extraordinary decision means that a public employer can be held liable under the First Amendment based on protected speech of which the employer is completely unaware and which therefore could not have motivated it to take an adverse personnel action. This accomplishes a result even more unsettling than the one the Court sought to avoid in *Mt. Healthy*: the mere possibility that an employee might have engaged in protected activity is permitted to block independently-motivated personnel decisions.

This erroneous rule exposes petitioners to liability for violating Churchill's asserted First Amendment interest in speaking out about the Hospital's cross-training policies—even though they did not know that she had done so and did not discharge her for this reason. At the time they discharged Churchill, petitioners understood only that she had made derogatory remarks about her superiors, and it is unrefuted that they chose to fire her for this unprotected speech alone. *See* Pet. Br. 29.[3] The decision of the court

[3] The derogatory comments which were reported to Churchill's superiors were clearly not of public concern and hence would not raise a First Amendment interest cognizable in federal court. *See Connick*, 461 U.S. at 147 ("when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior"). Churchill

below, however, makes petitioners liable for violating Churchill's free speech rights even though they were not aware of her protected expression at the time of the termination, much less motivated by it.

The notion that a public employer can be held liable for "accidental" violations of the First Amendment, Pet. App. 25, based on protected speech which played no part in its personnel decision, is, to say the least, unprecedented. It defies the teachings of this Court, which make the employer's motivation (and hence, by necessity, the employer's knowledge) central to its liability.

Finally, the court of appeals has created a problematic and unworkable standard for public employers. While the court disclaimed the imposition on employers of any particular "duty to investigate," *see* Pet. App. 27, its standardless approach to liability will, as a practical matter, necessitate extensive investigation on the part of employers before they take any adverse employment action. Even so, if a public employer fails to ferret out any element of protected expression that was, in fact, embedded within the insubordinate incident which prompted an adverse personnel action, the court of appeals' analysis would expose that employer to liability by virtue of its "inadequate investigation." Pet. App. 25.

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conceded below that the reports of Ballew and Perkins-Graham to Waters and Davis could be construed in such a manner. *See* Pet. Br. 29.

B. The Court of Appeals Disregarded the Public Employer's Interest In Fostering Constructive Working Relationships

Even if protected speech of which the employer is unaware can form the basis for First Amendment liability, the court of appeals erred by completely failing to balance the hospital's interest in fostering healthy working relationships between Churchill and her supervisors and co-workers against Churchill's alleged First Amendment interests.[4]

While employees clearly do not waive their First Amendment rights when they accept public employment, *see, e.g., Wieman v. Updegraff*, 344 U.S. 183 (1952), neither do they gain a license to use speech to disrupt and undermine their workplaces in a manner that would not be tolerated in the private sector. As the Court explained in *Connick*,

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[4] *Amici* here assume *arguendo* that the cross-training and hospital policy criticisms which Churchill alleges were contained within the conversation which led to her termination involve matters of public concern and therefore trigger First Amendment concerns. There is, however, reason to question whether Churchill's statements (even under her own version of the conversation) satisfy *Connick's* threshold requirement for a First Amendment interest cognizable in federal court, *i.e.*, that the speech in issue relates to "matters of public importance and concern" rather than merely to internal workplace concerns. *See* 461 U.S. at 143, 147-48. *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (speech "solely in the individual interest of the speaker and [the speaker's] specific business audience" is not protected); Pet. App. 47 ("the form and content of those statements indicate that they were not made to educate the public (or even [the cross-trainee] for that matter) about problems in OB, but rather to air Churchill's personal feelings about her supervisors at MDH").

> Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

461 U.S. at 147; *see Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414 (1979) ("the free speech rights of public employees are not absolute") (citing *Pickering*, 391 U.S. at 568). Hence, the Court has taken care to ensure that "the [First] Amendment's safeguard of a public employee's right, as a citizen, to participate in discussions concerning public affairs" not be "confused with the attempt to constitutionalize" ordinary employee grievances. *Connick*, 461 U.S. at 154.

Nor do public employers cede their ability to function as employers simply because of the public nature of the employment setting. Rather, the Court's constitutional analysis has given "full consideration" to "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. In *Connick*, the Court expressly grounded its holding not only in its concern with the protection of speech on matters of public concern, but also in "the practical realities involved in the administration of a government office." *Connick*, 461 U.S. at 154. And, "[w]hile as a matter of good judgment, public officials should be receptive to constructive criticism by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

The Court's precedents, therefore, require the judiciary "to arrive at a balance between the interests

of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. *Connick* held that even where an employee's speech relates to matters of public concern, the government's legitimate interest in " 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service' " may outweigh the employee's First Amendment interests. 461 U.S. at 150-51 (quoting *Ex Parte Curtis*, 106 U.S. 371, 373 (1882)).

Hence, the fact that an employee's speech touches on matters of public concern is, standing alone, insufficient to immunize her from personnel actions deemed necessary by the employer. As the *Connick* Court held, even where expression on matters of public concern is involved, the First Amendment does not allow the courts to "impos[e] an unduly onerous burden on the State" to justify its personnel actions. 461 U.S. at 149-50. In short, the determination of whether a public employer's interest in maintaining harmony in the workforce outweighs an employee's First Amendment interest in speaking on matters of public concern turns on a consideration of both the strength of the employee's First Amendment interest in the speech, and the manner and extent to which the speech disrupted (or threatened to disrupt) the efficiency and effectiveness of the workplace. *See id.* at 151-53.

Relevant to the strength of the employee's First Amendment interest in the speech is the degree to which it involves matters of public concern; if the employee's expression "touch[es] upon matters of

public concern in only a most limited sense," *id.* at 154, it is more easily outweighed than if it "more substantially involve[s] matters of public concern." *Id.* at 152. Here, as in *Connick*, the context in which Churchill's statements took place indicates that they were of limited public import.

Significantly, Churchill, like the employee in *Connick* (and unlike the employee in *Pickering*, *see* 391 U.S. at 566), did not seek to inform the public of any "actual or potential wrongdoing or breach of public trust." *Connick*, 461 U.S. at 148. Nor did she address any perceived legal or ethical violations to the appropriate legal or regulatory bodies. Instead, her comments were directed to a trainee, who had no authority to effectuate change. *See* Pet. App. 47 ("Churchill did not espouse her opinions to a public audience or to authorities with power to make changes in policy.")

While the First Amendment unquestionably extends to private conversations as well as public ones, *Givhan*, 439 U.S. at 414, the Court has recognized that

> [p]rivate expression . . . may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.

Id. at 415 n.4, *quoted in Connick*, 461 U.S. at 152-53.

Here, Churchill's critical statements about her superiors were far more subversive than a personal confrontation with a superior; because they were directed to a trainee, they had an even greater potential to erode authority and destroy working relationships. Churchill uttered her remarks to a trainee during working hours at the hospital, making it more likely that harmonious working relationships would be disrupted and that the functioning of the hospital would be impaired. In *Connick*, the Court similarly recognized that the fact the speech in question occurred in a workplace setting during working hours "supports [the employer's] fears that the functioning of his office was endangered." 461 U.S. at 153.

Moreover, as was the case in *Connick*, Churchill's statements arose "from an employment dispute concerning the very application of that policy to the speaker"; in such cases, the Court has held that "additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." *Connick*, 461 U.S. at 153. Churchill's comments were not made "out of purely academic interest" about hospital policy, *see id.*, but rather out of concern with the manner in which hospital policy affected her. *See* Pet. App. 47-48.

In weighing the public employer's interests, the Court has recognized that public employers have a legitimate interest in fostering harmony among coworkers and supervisors. *See Connick*, 461 U.S. at 151 ("it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors") (citation omitted); *Pickering*, 391 U.S. at 570 & n.3 (recognizing that there could be "positions in public employment in which the relationship between superior and subordinate is of such

a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship").

The importance of working relationships to the overall effectiveness of an organization has been well documented. *See* Daniel Katz & Robert L. Kahn, *The Social Psychology of Organizations* 324 (1966) ("There is ample evidence . . . that informal relationships in the work situation may be powerful enough to enhance greatly the performance of the organization or to impede substantially its ability to accomplish the formal mission.") (citing numerous studies); Hal G. Rainey, *Understanding and Managing Public Organizations* 17 (1991) ("the Hawthorne Experiments and other research underscored the importance of social and psychological factors in the workplace"). This is particularly true where, as here, the work setting requires employees to interact quickly and effectively in a broad range of situations.

A breakdown in working relationships can spell disaster for an organization's ability to function. "The presence of one incompetent or disgruntled worker can disrupt the work flow, antagonize other employees, and jeopardize whatever esprit de corps may be present." Cole Blease Graham, Jr. & Steven W. Hayes, *Managing the Public Organization* 144 (1986). While such a disruption is never desirable, it poses a particularly acute threat in a hospital setting, where employees' ability to function together effectively as a team is literally a matter of life and death. *See* Dr. Robin A.J. Youngston, *Operation!* 51 (1991) (emphasizing "the teamwork involved in the care of each patient," and noting that responsibility for any one patient "is divided amongst many different staff who then work together as a team"). *See also Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 26 (2d Cir. 1979) ("an *esprit de corps* is essential" among firefighters because "lives may be at stake"). In such a setting, the public employer's "prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch" must be given a high degree of protection. *Arnett*, 416 U.S. at 168 (Powell, J., concurring), *quoted in Connick*, 461 U.S. at 151.

The Court has, therefore, specifically ruled that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52. Certainly the need for close working relationships among nurses in a hospital when treating patients in the operating room and elsewhere is at least as weighty as the need for close working relationships in a District Attorney's office. *See Connick*, 461 U.S. at 151-52. Where, as here, only a limited First Amendment interest is implicated, a public employer need not "tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154. Nor need a public hospital tolerate such action when the resulting disruption in the workplace carries the potential to threaten patients' lives.

In this case, petitioners were not required "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152 (footnote omitted). Churchill's

"inherently disruptive" criticism of her superiors, Pet. App. 49, further undercut the already badly deteriorated relationship between Churchill and those superiors, *see* Pet. App. 2, 6, about which Churchill had been counselled and warned repeatedly. *See id.* at 33-34. Thus Churchill's insubordinate speech not only had the clear potential for disrupting the hospital, undermining authority, and destroying close working relationships among providers of patient care, it served to exacerbate a destructive workplace dynamic that was already well-advanced.

The need of a public hospital to respond forcefully to such destructive situations is manifest. Because the court of appeals disregarded that interest and failed to include it in its First Amendment analysis, the judgment below should be reversed.

II. THE COURT OF APPEALS MISAPPLIED THE QUALIFIED IMMUNITY DOCTRINE

The Court has long recognized the substantial social costs which litigation imposes on government officials.[5] Accordingly, the Court has repeatedly held that government officials retain a qualified immunity from damages suits unless their conduct violated

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[5] As the Court explained in *Harlow v. Fitzgerald*,

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

"clearly established statutory or constitutional rights of which a reasonable person would have known."[6] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is not enough, however, for a plaintiff seeking to overcome a qualified immunity defense merely to assert the denial of a right in its most generalized sense. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). Public officials must be "reasonably [able to] anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Accordingly, the Court has admonished that:

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (internal citation omitted). *See also Davis*, 468 U.S. at 190.

Viewed against these standards, it is clear that the court of appeals erred in denying the individual petitioners' qualified immunity defense. To be sure, at the time of respondent's discharge this Court had recognized that, in some circumstances, the dismissal of an employee for speaking on "a matter of legitimate

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[6] The Court has expressly recognized that supervisory officials in public hospitals are entitled to qualified immunity. *See Siegert v. Gilley*, 111 S.Ct. 1789, 1791-93 (1991); *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975).

public concern" could violate the First Amendment. *See Pickering*, 391 U.S. at 571-72. The Court had, however, expressly declined in *Pickering* and *Connick* to adopt so sweeping an approach as to make *any* dismissal where an employee has spoken on a matter of public concern constitutionally impermissible. As the Court emphasized in *Pickering*:

> Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

391 U.S. at 569.

This Court's own recognition of the difficulty of articulating a clear rule in the area is reason enough to reverse the court of appeals. Certainly one cannot expect medical personnel, who as a general matter have neither training nor experience in the law, to understand the intricacies of *Pickering*'s balancing test. Indeed, it bears emphasis that in this case the district court ruled in favor of petitioners on the First Amendment question based on recent Seventh Circuit precedents, *see* Pet. App. 46-48 (collecting cases); it is highly problematic to demand greater sophistication about subtle and amorphous constitutional doctrines from medical personnel than from experienced members of the federal judiciary.[7] As the Seventh Circuit itself has noted:

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[7] The court of appeals' holding—"that ignorance of the nature of the employee's speech . . . is inadequate to insulate officials from a § 1983 action," Pet. App. 27—represented a novel development in the Seventh Circuit's case law which was not apparent under the legal landscape existing at the time of respondent's discharge. *Cf. Elliott v. Thomas*, 937 F.2d 338, 344-46 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1242 (1992) (noting "[t]he inquiry [in a retaliatory transfer case] must focus on what the defendants knew"; "[t]he state of the law on mixed-motive transfers was in 1987—and remains—sufficiently ambiguous" as to entitle defendants to immunity).

> [T]he particularized balancing required by *Pickering* is difficult even for the judiciary to accomplish. Therefore, while it may have been clear since 1968 that a citizen does not forfeit his First Amendment rights entirely when he becomes a public employee, the scope of those rights in any given factual situation has not been well defined.

Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986).

In any event, the Court's post-*Pickering* cases provide no support for the Seventh Circuit's conclusion that "'a reasonable official [sh]ould [have understood] that what he [was] doing violate[d]' the employee's free speech rights if he fired her for speaking out on a matter of public concern." Pet. App. 27 (*quoting Anderson*, 483 U.S. at 640). In *Mt. Healthy*, for example, the Court held that even if "protected conduct played a 'substantial part' in the actual decision . . . [it] would not necessarily amount to a constitutional violation justifying remedial action." 429 U.S. at 285. The Court, sensitive to the complexities of the employment relationship, thus held that if the employer would have reached the same decision "even in the absence of the protected conduct," it had not violated the First Amendment. *Id.* at 287. And in *Connick*, the Court recognized that even when employee speech involves a

matter of public concern, the First Amendment does not require that the employer "tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships." 461 U.S. at 154.

As both *Mt. Healthy* and *Connick* demonstrate, the court of appeals focussed on the alleged constitutional violation at too great a level of generality in its qualified immunity analysis. If, under *Mt. Healthy*, public officials do not violate the First Amendment even when "protected conduct play[s] a 'substantial part' in the actual decision" if the discharge decision would have been made "even in the absence of the protected conduct," 429 U.S. at 285-87, then surely it cannot be said that "the unlawfulness" of a discharge decision made by a public official who is unaware of an employee's protected speech is "apparent" under "pre-existing law." *Anderson*, 483 U.S. at 640.[8] In these circumstances, the individual petitioners could not "reasonably . . . anticipate [that] their conduct [might] give rise to liability for damages," *Davis*, 468 U.S. at 195; they must, therefore, be protected from liability by the qualified immunity doctrine.

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[8] Indeed, it appears that at the time of respondent's discharge, the only court of appeals decision on the issue had held that an employer has no duty under the First Amendment to investigate the circumstances surrounding an employee's alleged insubordinate speech to determine if it addressed matters of public concern. *See Atcherson v. Siebenmann*, 605 F.2d 1058, 1064 (8th Cir. 1979).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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